MAY 1 3 1957

JOHN T. FEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 997

LUMBERMENS MUTUAL CASUALTY COMPANY,
Petitioner,

versus

RAYFORD J. WRIGHT, PLAINTIFF, AND
NATIONAL SURETY CORPORATION,
INTERVENOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

ALBERT E. BRAULT,
Transportation Building,
Washington, D. C.;

H. L. HAMMETT,
428 Whitney Building,
New Orleans, La.,
Counsel for Petitioner.

Montgomery & Co., "The Brief Specialists", 430 Chartres St., N. O., La.

INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES	2
STATEMENT	2
REASONS FOR GRANTING WRIT	8
CONCLUSION	13
CERTIFICATE	14
APPENDIX	15

CITATIONS.

Cases:

Bernhardt v. Polygraphic Co. of America, 350 U. S. 198 ..... 11, 12

Brandon v. K. C. Southern, 7 F. Supp. 1008 12

Charbonnet v. State Realty Co., 155 La. 1049, 99 So. 865 11

Cohen v. Beneficial Industrial Loan Corporation, 337 U. S. 541 11

Gaines v. Hennen, 24 Howard 568 12

Guaranty Trust Company of N. Y. v. York, 326 U. S. 99 ..... 6, 8, 11

Cases—(Continued):

	Page
Hotard v. Brodr. Wilhelmson Aktieselskabet, 23 F. (2d) 668	12
Erie Railroad Co. v. Tompkins, 304 U. S. 64	8, 11
Ernest M. Loeb Co. v. Avoyelles Drainage Dist., 60 F. Supp. 296	12
Long v. Chailan, 199 So. 222, 196 La. 380	5
Losch v. Greco, 173 La. 223, 136 So. 572	7
Ragan v. Merchants Transfer and Warehouse Co., 337 U. S. 530	6, 9, 10, 11
St. Louis S. W. R. R. v. Bolinger, 17 F. (2d) 925	12
Sartor v. Southern Carbon Co., 61 F. Supp. 649	12
State v. United Dredging Co., 218 La. 744, 50 So. (2d) 826	4, 5
Waterman v. Powell, 66 F. (2d) 80	12
Woods v. Interstate Realty Co., 337 U. S. 535	11

Statutes:

Louisiana Revised Civil Code:

Article 3516	2, 6
" 3518	2, 4, 8, 9, 12
" 3519	2, 3, 6, 7, 8, 9, 12
" 3536	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. ———

LUMBERMENS MUTUAL CASUALTY COMPANY,
Petitioner,

versus

RAYFORD J. WRIGHT, PLAINTIFF, AND
NATIONAL SURETY CORPORATION,
INTERVENOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Lumbermens Mutual Casualty Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on February 27, 1957.

OPINIONS BELOW.

The opinion of the District Court for the Western District of Louisiana (R. p. 28) is reported in 134 F. Supp. 715. The opinion of the Court of Appeals for the Fifth Circuit (R. p. 84) is reported at 242 F. (2d) 1.

JURISDICTION.

The opinion of the Court of Appeals for the Fifth Circuit was made and entered on February 27, 1957 and a copy thereof is appended to this petition in the Appendix at page 15. Rehearing was denied by order entered on April 12, 1957. No opinion was rendered in connection with the order denying the petition for rehearing. The opinion of the District Court is set forth at page 20 of the Appendix. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

The question presented is whether Article 3519 of the Civil Code of the State of Louisiana must be applied in a diversity action by a federal court sitting in Louisiana.

STATUTES INVOLVED.

Articles 3516, 3518, 3519 and 3536 of the Civil Code of Louisiana are set forth in the Appendix at page 28. Articles 3518 and 3519 are also quoted below.

STATEMENT.

On March 25, 1948 Rayford Wright, the respondent, filed a direct action against an insurer, Lumbermens Mutual Casualty Company, the petitioner, solely on grounds of diversity of citizenship, to recover damages for personal injuries. National Surety Corporation, the workmen's compensation insurer of Wright's employer, intervened to assert its subrogation claim.

Answers were filed to the complaint on June 2, 1948 and to the intervention on September 13, 1948 but no

further steps were taken in the prosecution of the suit for almost six years. On July 8, 1954, the district judge entered an order dismissing the suit for failure to prosecute under Rule 41 (b) of the Federal Rules of Civil Procedure but upon application of respondents recalled this order. Petitioner had advised the Court that it objected to the reinstatement and thereafter filed a supplemental answer and motion to dismiss on the ground that the suit had been abandoned under Article 3519 of the Louisiana Civil Code inasmuch as over five years had elapsed without any steps having been taken by respondents in the prosecution of the suit and hence must be dismissed. The motion was granted and suit was dismissed. The well reasoned opinion of the district judge, a Louisiana lawyer, as was the writer of the opinion in the Court of Appeals, appears in the record at page 28 and also in the Appendix at page 20.

The Court of Appeals reversed, holding that Article 3519 of the Louisiana Civil Code, under which the suit had been dismissed, was not applicable in the federal courts of Louisiana.

In order that the opinion of the Court of Appeals below may be understood a brief explanation of Article 3519 and of its place in the law of Louisiana is necessary.

Article 3519 reads as follows:

> "Abandonment or discontinuance of suit.—If the plaintiff in this case, after having made his demand, abandons or discontinues it, the interruption shall be considered as having never happened."

"Whenever the plaintiff having made his demand shall at any time before obtaining final judgment allow five years to elapse without having taken any steps in the prosecution thereof, he shall be considered as having abandoned the same.

The Article, as the Louisiana Supreme Court case of *State v. United Dredging Co.*, 218 La. 744, 50 So. (2d) 826, states, "is contained in paragraph 5 of Section 2 of Title XXIII of the Civil Code which treats of causes which interrupt prescription".

Immediately preceding the cited Article appears Article 3518 which is the Codal Article which covers the interruption of the statute of limitations by the filing of suit. The latter Article reads as follows:

"Article 3518. **Legal Interruption by Filing of Suit.**—A legal interruption takes place, when the possessor has been cited to appear before a court of justice, on account either of the ownership or of the possession; and the prescription is interrupted by such demand, whether the suit has been brought before a court of competent jurisdiction or not."

State v. United Dredging Co., supra, further held that Article 3518, "must be read in connection with Article 3519 and is subject to the limitations therein contained".

Of course neither of the cited Articles is the statute of limitations itself, which in this case is Article 3536 by which a limitation of one year is prescribed for tort actions. Further explaining these Articles, the following

quotation from *Long v. Chailan*, 196 La. 380, 199 So. 222, relied upon by the district judge, is pertinent:

> "According to article 3518 of the Civil Code the filing of the previous suits had the effect of interrupting the prescription which is pleaded in this suit. But, according to article 3519, as amended by Act No. 107 of 1898, the effect of the plaintiffs' allowing five years to elapse without taking any steps in the prosecution of their suits was to do away with the interruption of prescription . . . so completely that 'the interruption shall be considered as having never happened'."

Further, the case of *State v. United Dredging Co.* referred to both Articles as "general law" in the following language:

> "By relying on the general law of procedure relative to the interruption of prescription, the State was bound by all other procedural statutes akin thereto and, albeit, was required under Article 3519 to take steps in the prosecution of the action within five years just as any private suitor. Even the sovereign cannot be permitted to invoke **the general law in its favor and at the same time assert that it is not bound thereby.**" (Emphasis ours).

The district judge below (R. pp. 30, 31) paraphrased the law of Louisiana in the following language:

> "We find the law of Louisiana to be that an action prescribes in one year (3536) unless it is interrupted (3516). Suit is an interruption (3518) but if a suit remains unprosecuted for five years the in-

terruption shall be considered as having never happened (3519)."

The opinion of the Court of Appeals held that Article 3519 was not an integral part of the statute of limitations so as to make applicable *Guaranty Trust Company v. York*, 326 U. S. 99, or *Ragan v. Merchants Transfer and Warehouse Co.*, 337 U. S. 530, upon which the district court relied. The Court of Appeals stated that, "All that was held in Guaranty Trust Company was that a federal court adjudicating a state created right in a diversity case cannot afford recovery if a state statute of limitations would have barred recovery had the suit been brought in a court of the state." The Court distinguished the Ragan case on the ground that the state statute in that case was clearly an "integral part of the statute of limitations in that it required actual service of summon on the defendant to effectuate a legal interruption of prescription."

The Court of Appeals admitted that Article 3519 must be read *in pari materia* with "Articles 3516 through 3520 of the Louisiana Civil Code which treat 'of causes which interrupt prescription'," but held that this did not mean that Article 3519 affected the cause of action or that it was an integral part of the state statute of limitations.

The reason given by the Court of Appeals for this conclusion is that the Louisiana decisions interpreting the Article hold that "a **dismissal** for want of prosecution does not affect the cause of action and constitutes no bar to a subsequent suit". (Emphasis ours.)

The Court of course was correct in stating that the mere dismissal itself did not affect the cause of action.

Petitioner made no such claim. What petitioner did and does claim is that Article 3519 has rendered the suit a nullity, that the interruption provoked by the suit has ceased as if suit never existed and that consequently the cause of action is now open to a plea of the statute of limitations. The dismissal of the suit itself is purely incidental but vitally important. The Louisiana decisions have uniformly held that a plea of the statute of limitations cannot be made in the suit itself because it is no longer existent and the only action which can be taken by the Court is to dismiss it. But unless the action is dismissed plaintiff presumably can and will proceed to judgment. Unless the action is dismissed judgment will be obtained in a suit which under Louisiana law is null and void for all purposes. Unless the action is dismissed petitioner is deprived of a valuable property right, namely the right to plead prescription which the Louisiana decisions have held can be pleaded only in a new action if one is instituted.

The opinion of the Court of Appeals itself admitted the correctness of petitioner's argument. It closed with the following quotation from *Losch v. Greco*, 173 La. 223, 136 So. 572, which fully substantiates petitioner's appraisal of the Louisiana decisions:

> "The abandonment which results as a legal consequence of a plaintiff's failure to take any action in his suit during a period of five years merely bars his right to continue with the prosecution of that suit. It does not prevent his bringing another suit for the same cause of action, but if he brings another suit for the same cause of action the question of whether his right of action is barred by pre-

scription must **be** determined **as if no suit had theretofore been brought."** (Emphasis ours).

The decision of the Court makes no reference to the underlying philosophy of *Erie Railroad Co. v. Tompkin; Guaranty Trust Company of N. Y. v. York* and other decisions of Your Honors to the reiterated effect that a federal court in a case such as this is "only another court of the state" and that, "the accident of a suit by a non-resident litigant in a federal court instead of in a state court a block away should not lead to a substantially different result". *(Guaranty Trust Company of N. Y. v. York, supra).*

REASONS FOR GRANTING WRIT.

The decision below should be reviewed.

1) The judgment of the district court scrupulously followed *Erie Railroad Co. v. Tompkins; Guaranty Trust Company v. York, supra,* and other cases establishing the well settled law of this Court, whereas the Court of Appeals gave lip service only to these cases and in effect flagrantly disregarded them.

2) The effect of the Court of Appeals' decision, unless reversed by this Court, will be to plunge federal jurisprudence in Louisiana into uncertainty and confusion. Since Article 3519 under state decisions is part and parcel of Article 3518 and a limitation thereof, if Article 3519 does not apply in the federal courts, Article 3518 is likewise inapplicable. If Article 3518 is eliminated (and R. S. 9:5801, its *alter ego* mentioned below, would go to) the possibilities of confusion would be endless.

3) If Article 3519 is inapplicable and this suit need not be dismissed, plaintiff will obtain a judgment, though his cause of action has actually prescribed. For if this suit is not a nullity under Article 3519, the statute remains interrupted. In effect the federal court will flout the statute of limitations thereby depriving petitioner of the valuable right of pleading the statute and respondents will obtain recovery, where such recovery would be barred in a Louisiana court.

It is submitted that the decision of the Court of Appeals is in obvious error in holding that Article 3519 was not an integral part of the statute of limitation and that it does not affect the cause of action.

It is hard to understand how the Court of Appeals concluded that Article 3519 was not an integral part of the statute of limitations. As seen above the Louisiana courts have linked it indissolubly with Article 3518 and have not only deemed it part of the general law but part of the law concerning the interruption of prescription. This the Court of Appeals admits, since it concedes Article 3519 should be read with Article 3518. In *Ragan v. Merchants Transfer and Warehouse Co., supra*, the Kansas statute required service of summons in order to interrupt prescription. Article 3518 was originally so interpreted. In its original form actual citation was required in order to interrupt prescription. In 1932 the Legislature of Louisiana passed Act No. 39, now R. S. 9:5801, under which the filing alone of suit in a court of competent jurisdiction interrupts prescription. However Article 3518 is still the same kind and character of statute which Your Honors held in the *Ragan* case must be applied in the federal courts. Article 3519 is part and parcel of 3518, since it

limits, as the Louisiana Supreme Court said, the term and extent of the interruption created by the filing of suit. Neither the *Ragan* case nor any other case limited the applicability of such statute to the **original** interruption of prescription. On the contrary, the *Ragan* case said, "It (the cause of action) accrues and comes to an end when local law so declares"; that "the measure of it is to be found only in local law"; that the cause of action "carries the same burden and is subject to the same defenses in the federal court as in the state court".

As above stated the Court of Appeals pitched its decision on the undoubted fact that the dismissal alone does not affect the cause of action. This is utterly unimportant. The cause of action had already been affected. Respondents admitted, and the district court found, that while they did not intend to abandon their suit there was no legal reason why they could not have proceeded with it. As a matter of fact, respondents' brief in the Court of Appeals gave as their only reason for not prosecuting the suit that they could not reach an agreement among themselves as to the division of a possible award between plaintiff and intervenor until November 30, 1954. Hence it was admitted throughout the proceedings in both courts below that if this suit is dismissed and plaintiff brings a new suit, such suit could not withstand a plea of the statute of limitations. The only hope which plaintiff has of preserving his claim lies in the continued maintenance of this action. In substantial effect, therefore, the Court of Appeals has not merely decided that this action need not be dismissed; it has actually held that this action constitutes a living and existing interruption of prescription and hence may be prosecuted to judgment. This squarely violates

Louisiana law. As the Supreme Court of Louisiana stated in *Charbonnet v. State Realty Co.*, 155 La. 1049, 99 So. 865:

> "The amended article (3519 of the Civil Code) when read in connection with the subject-matter of the section and of the article 3518 immediately preceding it, clearly means that a suit which has been abandoned for non-action during a period of five years does not constitute a legal interruption to the course of prescription, and its effect is to leave a plaintiff in the same position that he would occupy if he had not instituted the suit."

It is almost unnecessary to quote the reiterated philosophy of this Court as expressed originally in *Erie Railroad Co. v. Tompkins, supra; Guaranty Trust Company of N. Y. v. York, supra; Ragan v. Merchants Transfer and Warehouse Co., supra*, as well as in *Cohen v. Beneficial Industrial Loan Corporation*, 337 U. S. 541; *Woods v. Interstate Realty Co.*, 337 U. S. 535 and in the even later case of *Bernhardt v. Polygraphic Co. of America*, 350 U. S. 198, that a suit cannot have "longer life in the federal court than it would have had in the state court without adding something to the cause of action" *(Ragan)*; that where, "in such cases, one is barred from recovery in the State Court he should likewise be barred in the Federal courts" *(Woods)*; that "the outcome of litigation in the federal court should be substantially the same, so far as legal rules determining the outcome of a litigation, as it would be if tried in a state court" *(Guaranty Trust)*. The decision below violates these principles.

In striking illustration of the point above made, where the effect on the cause of action was, we think, much

more remote, is *Bernhardt v. Polygraphic Co. of America, supra*, where a federal court was not permitted by Your Honors to require arbitration where the state would not have allowed it, because, otherwise, as Your Honors said, "the outcome of the litigation might depend on the courthouse where suit is brought."

In addition, both Articles 3518 and 3519 have always been applied in the federal courts of Louisiana. See *St. Louis S. W. R. R. v. Bolinger*, 17 F. (2d) 925; *Hotard v. Brodr. Wilhelmson Aktieselskabet*, 23 F. (2d) 668; (see also, *Waterman v. Powell*, 66 F. (2d) 80); *Ernest M. Loeb Co. v. Avoyelles Drainage Dist.*, 60 Fed. Supp. 296; *Sartor v. Southern Carbon Co.*, 61 Fed. Supp. 649 and *Brandon v. K. C. Southern*, 7 Fed. Supp. 1008. As early as the famous case of *Gaines v. Hennen*, 24 Howard 568, Your Honors applied both of these articles in the following language:

> "By the article of the Code 3484 (3518) a legal interruption of a prescription takes place where the possessor has been called to appear before a court of justice either on account of the property or the possession and the prescription is interrupted by such demand whether the suit is brought before a court of competent jurisdiction or not." "The weight of authority upon the construction of that article of the Code is that it contemplates a voluntary intentional and active abandonment of the suit in order to restore the running of prescription. (The last sentence of course refers to Article 3519 and is no longer a correct statement, since because of the addition of the five year clause in the year of 1898 mere inaction is sufficient)."

It is respectfully submitted therefore that the reasons for granting the writ are most urgent and compelling. Not only has there been a clear cut disregard of the applicable law as enunciated by this Court, but the possibilities of great harm arising from the decision of the Court of Appeals are both real and imminent.

Also petitioner has been deprived of its right to plead the statute of limitations by the arbitrary and unjustifiable action of the Court of Appeals in setting up a different rule and measure as to the interruption of the statute of limitations in the federal courts.

Finally the entire legal situation with regard to the interruption of prescription in Louisiana as far as the federal courts are concerned has been brought to a state of chaos by this decision. Litigants cannot and will not know when the statute has been interrupted or how long the interruption lasts until Your Honors have furnished the answer.

CONCLUSION.

For the reasons set forth above it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

ALBERT E. BRAULT,
Transportation Building,
Washington, D. C.;

H. L. HAMMETT,
428 Whitney Building,
New Orleans, La.,
Counsel for Petitioner.

CERTIFICATE.

I hereby certify that copies of this brief have been served on Edward Dubuisson, attorney for respondents, Rayford J. Wright, plaintiff, and National Surety Corporation, Intervenor, this ... day of May, 1957.

Counsel for Petitioner

APPENDIX.

(Opinion of the Court of Appeals for the Fifth Circuit).

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16,066

RAYFORD J. WRIGHT and NATIONAL SURETY CORPORATION, INTERVENOR,

Appellants,

versus

LUMBERMEN'S MUTUAL CASUALTY COMPANY,

Appellee.

Appeals from the United States District Court for the Western District of Louisiana.

(February 27, 1957).

Before BORAH, TUTTLE and CAMERON, Circuit Judges.

BORAH, Circuit Judge: The question involved on this appeal is whether the District Court committed error in dismissing the action for want of prosecution. For a

clear understanding of the problem at hand, it would appear in order that we set forth in brief the events leading up to the judgment of dismissal.

This action was brought in the District Court for the Western District of Louisiana solely on the grounds of diversity of citizenship. Rayford J. Wright, on March 25, 1948, instituted it there when he filed suit under the Louisiana Direct Action Statute against the New Amsterdam Casualty Company, the insurer of Pierson Construction Company, to recover damages for personal injuries sustained by him as a result of the insured's alleged negligence. Following the institution of suit, National Surety Corporation, the workmen's compensation insurance carrier for plaintiff's employer, intervened to assert its subrogation claim for recovery of an amount which it had paid to plaintiff. The defendant filed its answer to the complaint on June 2, 1948, and to the intervention on September 13, 1948, but no further steps were taken in the prosecution of the suit for almost six years. On July 8, 1954, the district judge entered the following order: "This action having been filed on March 25, 1948, no forward steps in its prosecution having been taken for more than three years; and in order to clear the docket of this Court; IT IS ORDERED, ADJUDGED AND DECREED that this action be and it is hereby dismissed. If good cause be shown, within ten (10) days from this date, this action may be reinstated upon the docket of this Court."[1] Thereafter and on July 16, the Court by letter-order to the Clerk reinstated the cause on the docket and recalled its

[1] In its memorandum opinion, the Court stated that after entry of the July 8, 1954, order dismissing the suit, plaintiff's attorney wrote a letter to the Court requesting that the case be reinstated, but that letter does not appear in the record on this appeal.

previous order of dismissal. Approximately eight months after the case had been reinstated on the docket, the defendant filed a supplemental answer and a motion to dismiss, alleging in both pleadings the common ground that plaintiff's cause of action and demand were prescribed under the laws of Louisiana, and more particularly under Civil Code Articles 3519 and 3536, inasmuch as more than five years had elapsed without any steps having been taken in the prosecution of the demand. The motion was granted and judgment entered dismissing the action without prejudice on the ground that the Court was bound, under *Guaranty Trust Co. v. York*, 326 U. S. 99, to apply Article 3519 of the Louisiana Civil Code, and to strike the case from the docket since five years had elapsed without the plaintiff's having taken any steps in the prosecution of the cause.[2] This appeal followed.

Appellant rightly concedes that the court would have had the discretionary power to dismiss the suit for failure to prosecute either under its inherent powers which the court may exercise on its own motion, or pursuant to a motion filed under Rule 41(b) of the Federal Rules of Civil Procedure, but vigorously insists that the court erred in refusing to exercise its discretionary powers and in holding that it was bound to dismiss under state law.

This argument, we think, is predicated in part upon appellant's assumption that the motion invoked the exercise of the court's discretion, whereas, and as the trial court correctly found, all that was presented for the court's decision was whether the court was bound to apply the applicable law of Louisiana which declares that a suit must

[2] The District Court's opinion is reported in 134 F. Supp. 715.

be considered as abandoned if no steps in prosecution thereof are taken for five years. However, we do agree with appellant that the court erred as a matter of law in granting the motion on the ground that the governing principles enunciated in *Guaranty Trust Co. v. York, supra*, required the application of Article 3519, "an integral part of the statute of limitations," by a federal court sitting in Louisiana. We do not think that the *Guaranty Trust* case or *Ragan v. Merchants Transfer Co.*, 337 U. S. 530, on which the District Court also relied, either required or contemplated this result. All that was held in *Guaranty Trust* was that a federal court adjudicating a state-created right in a diversity case cannot afford recovery if a state statute of limitations would have barred recovery had the suit been brought in a court of the state. In the *Ragan* case, the state statute invoked by the defendant was clearly an "integral part of the statute of limitations" in that it required actual service of summons on the defendant within the prescriptive period to effectuate a legal interruption of prescription. And the Supreme Court, following *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, and *Guaranty Trust Co. v. York, supra*, there pointed out that inasmuch as the *cause of action* sued upon was created by local law, it accrues and comes to an end when local law so declares, and that consequently in a diversity case a federal court "must follow suit". Accordingly, the court held that recovery must be denied since service had not been made in the federal suit prior to the running of the limitation period.

While in the instant case it is true that Articles 3516 through 3520 of the Louisiana Civil Code, which treat "Of Causes Which Interrupt Prescription", must be read

in pari materia, it by no means follows *that Article 3519 affects the cause of action or that* it is "an integral part of the state statute of limitations" within the meaning of the *Guaranty Trust* and *Ragan* cases. And we think this conclusion is fully warranted, for the Louisiana decisions interpreting the article clearly hold that a dismissal for want of prosecution does *not* affect the cause of action and constitutes no bar to a subsequent suit on the same cause of action. *Charbonnet v. State Realty Company*, 155 La. 1044, 99 So. 865; *Losch v. Greco*, 173 La. 223, 136 So. 572; *Seligman v. G. A. Scott & Bro.*, 17 La. App. 486, 134 So. 771. In other words and as was stated in *Losch v. Greco, supra*, "the abandonment which results as a legal consequence of a plaintiff's failure to take any action in his suit during a period of five years merely bars his right to continue with the prosecution of that suit. It does not prevent his bringing another suit for the same cause of action; but, if he brings another suit for the same cause of action, the question of whether his right of action is barred by prescription must be determined as if no suit had been theretofore brought."

In the light of the foregoing, it follows that the District Court erred in dismissing the action.

REVERSED.

(Opinion of the District Court).

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA OPELOUSAS DIVISION

CIVIL ACTION

NO. 2358

RAYFORD J. WRIGHT

vs.

LUMBERMEN'S MUTUAL CASUALTY CO.: NATIONAL SURETY CORPORATION, Intervenor.

FOR PLAINTIFF	Messrs. Edward Dubuisson Barnett Building Opelousas, Louisiana
FOR DEFENDANT	H. L. Hammett Whitney Building New Orleans, Louisiana
FOR INTERVENOR	A. V. Pavy Opelousas, Louisiana

HUNTER, JUDGE:

The essential facts, briefly stated, are these: This is a suit for personal injuries received by plaintiff. The occurrence on which it is predicated happened in Evangeline Parish, Louisiana on January 6, 1947. Defendant is

the liability insurer of the party whose negligence allegedly caused the accident. Jurisdiction is based solely on diversity of citizenship. Suit was filed cn March 25, 1948. The case was put at issue on September 13, 1948. For a period of almost six years no steps towards the prosecution of this case were taken. On July 8, 1954, this court, on its own motion and pursuant to its policy and inherent power to keep its docket clear, ordered the suit dismissed because no forward steps had been taken in the prosecution of same. On July 13, 1954, plaintiff's attorney wrote a letter to the court requesting that the case be reinstated. On July 15, 1954 the court, by an ex parte order, directed the Clerk to reinstate the suit on the docket. The record reveals that no action was taken in this case, of any nature, between September 13, 1948 (the date answer was filed) and July 8, 1954. Defendant's counsel advised the court by telegram of July 19, 1954 that he objected to the reinstatement and urged that the suit had been abandoned under Louisiana Civil Code Article 3519. A formal motion to dismiss is now before the court.

The ultimate question to be decided is whether a federal court, having jurisdiction only because parties are diverse citizens, must apply a statute of the forum state declaring suit abandoned if no steps in prosecution thereof are taken for five (5) years.

Article 3519 of the Louisiana Revised Civil Code reads in pertinent part as follows:

> "If the plaintiff in this case, after having made his demand, abandons or discontinues it, the interruption shall be considered as having never happened. Whenever the plaintiff having made his

demand shall at any time before obtaining final judgment allow five years to elapse without having taken any steps in the prosecution thereof, he shall be considered as having abandoned the same."

This article is one of a series of articles supplementing Article 3536 of the Code which provides a one-year prescriptive period for tort actions in Louisiana. Article 3536 is not directly before the court, and whether or not the demands of the plaintiff and intervenor here may be reasserted in another suit in the face of the one-year prescription of Article 3536 must be decided if and when such a new action is commenced.

All that we are concerned with here is whether this suit must be dismissed for the failure of plaintiff and intervenor to prosecute same for a period in excess of the five-year period set down in Article 3519. Articles 3516, 3518 and 3519 of the Louisiana Civil Code and Article 3536, which is the prescription article itself, must be construed together. There is no question but that Article 3536 (the one-year prescriptive statute) is applicable in the federal courts, and we agree with counsel for plaintiff that all of these articles must be considered together. Paraphrasing all of these articles, we find the law of Louisiana to be that an action prescribes in one year[1] unless it is interrupted.[2] Suit is an interruption,[3] but if a suit remains unprosecuted for five years, the interruption shall be considered as having never happened.[4]

---

[1] Article 3536, Revised Civil Code of Louisiana.
[2] Article 3516, Revised Civil Code of Louisiana.
[3] Article 3518, Revised Civil Code of Louisiana.
[4] Article 3519, Revised Civil Code of Louisiana.

A simple reading of the cited codal articles leaves no doubt that Article 3519 is an integral part of the statute of limitations. In *State v. United Dredging Co.*, 218 La. 744, 50 So. (2d) 826, the Supreme Court of Louisiana declared that Article 3518 must be read in connection with 3519. The court declared:

> "Article 3519 is contained in paragraph 5 of Section 2 of Chapter 3 of Title XXIII of the Civil Code which treats 'Of the Causes which Interrupt Prescription'. Article 3518, providing that prescription is interrupted by citation of the possessor, has been superseded by Act No. 39 of 1932 LSA-RS 9:5801, which declares that the filing of a suit in a court of competent jurisdiction interrupts all prescriptions. This article, changed as aforesaid, must be read in connection with Article 3519 and is subject to the limitations contained therein."

It is true that in the above cited case Article 3519 is called a procedural statute. *Nevertheless, 3518 and 3519 are stated to be part of the general law of prescription.* Very pertinent and decisive is the following quotation from the Louisiana State Supreme Court's decision in *Long v. Chailan*, 196 La. 380, 199 So. 222:

> "According to article 3518 of the Civil Code the filing of the previous suits had the effect of interrupting the prescription which is pleaded in this suit. But, according to article 3519, as amended by Act No. 107 of 1898, the effect of the plaintiffs' allowing five years to elapse without taking any steps in the prosecution of their suits was to do away with the interruption of prescription—so

completely that the interruption shall be considered as having never happened."

Vigorously argued by plaintiff's counsel is the proposition that this Louisiana Civil Code Article is not applicable because its provisions are rules of procedure rather than rules of substantive law. Conceding, but not deciding this to be so, would not determine that the article is not applicable. Rules which lawyers and judges call procedural do more than regulate procedure. By its express terms and interpretations, this article is an integral part of the state statute of limitations *(supra)*. The precise point was adjudicated in *Guaranty Trust Co. of N. Y. v. York*, 1945, 65 S. Ct. 1464, 326 U. S. 99. There the court said:

> "It is therefore immaterial whether statutes of limitation are characterized either as 'substantive' or 'procedural' in State Court opinions in any use of those terms unrelated to the specific issue before us. Erie R. Co. vs. Tompkins was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and Federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies Erie R. Co. vs. Tompkins is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a state court a block away, should not lead to a substantially different result."

"The fact that under New York law a statute of limitations might be lengthened or shortened, that a security may be foreclosed though the debt be barred, that a barred debt may be used as a set-off, are all matters of local law properly to be respected by federal courts sitting in New York when their incidence comes into play there."

The principles of the *Guaranty Trust Company* case, *supra*, were affirmed in three cases decided by the Supreme Court of the United States on June 20, 1949, namely, *Cohen v. Beneficial Industrial Loan Corp.*, 69 S. Ct. 1221, 337 U. S. 541; *Woods v. Interstate Realty Co.*, 69 S. Ct. 1235, 337 U. S. 535; and *Ragan v. Merchants Transfer and Warehouse Co.*, 69 S. Ct. 1233, 337 U. S. 530. Article 3519 can and must be applied in the federal courts in Louisiana. Its application is in full accord with the principle of these cited decisions of the United States Supreme Court *(supra)*, and it cannot be disregarded by the federal court as a mere procedural device.

Plaintiff insists that Rule 41 (b) of the Federal Rules deals with the subject of dismissal for lack of prosecution in the federal courts and therefore the subject is recognized as procedural and the federal rule alone prevails. Rule 41 (b) reads in pertinent part as follows:

"*For failure to prosecute* or to comply with these rules or any order of court, *a defendant may move for dismissal* of an action or any claim against him." (Emphasis mine).

There is nothing in 41 (b) to prohibit the application in the federal courts of the Louisiana Civil Code Ar-

ticle 3519. Counsel for plaintiff vigorously argues that if the court dismisses here on 3519, it will deprive itself of its power under 41 (b) to dismiss any suit for failure to prosecute for a period of less than five years. I cannot agree. This court has the right in the exercise of its inherent power to keep its dockets clear to dismiss on its own motion for want of prosecution or provide by local rule for automatic dismissal of causes in which no action has been taken within a prescribed period. This, of course, is not an issue here.

In the alternative defendant contends that if it should be held that this court is bound by Article 3519, the failure to prosecute for five years raises only a rebuttable presumption of plaintiff's intention to abandon and that plaintiff must be allowed to show that he did, in fact, never intend to abandon the suit.

The Supreme Court of Louisiana has held in no uncertain terms that:

> "When a plaintiff permits five years to elapse without having taken affirmative action in the suit, *he is conclusively presumed to have abandoned it*, and that no further proceedings can be had with reference to it, other than to strike it from the docket. State v. United Dredging Co., 218 La. 744, 50 S. (2d) 826. (Emphasis mine).

In *Zatarin v. Porters*, 63 S. (2d) 477, a lower Louisiana court said that Article 3519 did not create an absolute presumption of the intention of a plaintiff to abandon, but there, both litigants were in military service and the Soldiers' and Sailors' Civil Relief Act of 1940, 50

U.S.C.A., Appendix 501, et seq., governed. Even if we were to follow this dicta and ignore the decision of the Louisiana Supreme Court, the question would not be one of intention but would be *whether the plaintiff or intervenor were prevented from taking some affirmative action by circumstances beyond their control.* There is nothing to suggest that plaintiff and intervenor have been prevented from prosecuting this suit. The court here is assuming that there was no actual intention to abandon. In his brief, plaintiff says:

> "While we appreciate Your Honor's willingness to assume as true plaintiff's statement that as a matter of fact he never intended to abandon this suit, we wonder what would be the situation on appeal in the absence of evidence supporting that fact or without some sort of stipulation between the parties in lieu of such evidence."

The motion to dismiss is sustained. The dismissal shall not operate as an adjudication upon the merits. (Rule 41b).

A motion for rehearing will be granted if timely filed, for the purpose of permitting plaintiff and intervenor, or either of them, to put into the record any evidence to show that they were prevented from prosecuting this suit between 9-13-48 and 7-8-54 by circumstances beyond their control.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, on this the 12th day of September, 1955.

(Articles of the Revised Civil Code of Louisiana).

"Article 3516. **Methods of Interrupting Prescription.**—There are two modes of interrupting prescription; that is by a natural interruption, or by a legal interruption."

"Article 3518. **Legal Interruption By Filing of Suit.**—A legal interruption takes place, when the possessor has been cited to appear before a court of justice, on account either of the ownership or of the possession; and the prescription is interrupted by such demand, whether the suit has been brought before a court of competent jurisdiction or not."

"Article 3519. **Abandonment Or Discontinuance of Suit.**—If the plaintiff in this case, after having made his demand, abandons or discontinues it, the interruption shall be considered as having never happened.

"Whenever the plaintiff having made his demand shall at any time before obtaining final judgment allow five years to elapse without having taken any steps in the prosecution thereof, he shall be considered as having abandoned the same."

"Article 3536. **Other Actions Prescribed By One Year.**—The following actions are also prescribed by one year: That for injurious words, whether verbal or written, and that for damages caused by animals, or resulting from offenses or quasi offenses." (Remainder of Article not pertinent and hence omitted).